Boston College Law Review

Volume 20
Issue 3 *Number 3*

Article 6

3-1-1979

Qualified Immunity for Executive Officials for Constitutional Violations: Butz v. Economou

Blake Hornick

Qualified Immunity for Executive Officials for Constitutional Violations: *Butz v. Economou* [1]—Arthur N. Economou owned Arthur N. Economou and Co., Inc., which was registered with the United States Department of Agriculture as a commodity futures merchant.[2] The Department of Agriculture audited the firm,[3] and then in 1970 filed an administrative complaint which sought to revoke or suspend Economou's registration for willful failure to maintain the minimum financial requirements prescribed by the Department.[4] While the administrative complaint was pending before the Judicial Officer of the Department,[5] Economou filed a complaint in the United States District Court for the Southern District of New York naming as defendants the United States, the Department of Agriculture, the Commodity Exchange Authority (CEA), the Secretary and Assistant Secretary of Agriculture, the Judicial Officer, the Chief Hearing Examiner, several officials of the CEA, the Agriculture Department attorney who prosecuted the enforcement action, and several of the auditors who had investigated or testified against Economou.[6]

---

[1] 438 U.S. 478 (1978).

[2] *Id.* at 481.

[3] *Id.* At the time, the Commodity Exchange Act, ch. 368, § 8, 42 Stat. 1003 (1922), conferred upon the Secretary of Agriculture the power to investigate an agricultural commodity trading company. This power of investigation has since been vested in the Commodity Futures Trading Commission. 7 U.S.C. § 12 (1976).

[4] 438 U.S. at 481. As a registered futures commission merchant, Economou was required to maintain a minimum capital balance. 7 U.S.C. § 6f(2) (1976). The regulations setting forth the requisite financial standards are contained in 17 C.F.R. § 1.17 (1976). The disciplinary procedure to be employed against violators of either the Commodity Exchange Act or the regulations promulgated thereunder are contained in § 9 of the Act, 7 U.S.C. § 9 (1976).

[5] The complaint had first been sustained by the Chief Hearing Examiner of the Department, whose decision was subsequently affirmed by the Department's Judicial Officer. 438 U.S. at 481. The penalty imposed was a 90 day suspension. Economou v. United States Dept. of Agriculture, 494 F.2d 519, 519 (2d Cir. 1974) (per curiam). The Secretary had delegated his decisional authority in enforcement proceedings to the Judicial Officer. 438 U.S. at 481.

After an order is issued by the Secretary of Agriculture, the person against whom such order is directed may seek judicial review in the court of appeals for the circuit in which he does business. 7 U.S.C. § 9 (1975). Economou did so, and on his petition for review, the United States Court of Appeals for the Second Circuit held that "the essential finding of willfulness . . . was made in a proceeding instituted without the customary warning letter," which could have led to a correction of the claimed capital insufficiencies. The court therefore vacated the order of the Judicial Officer. Economou v. United States Dept. of Agriculture, 494 F.2d 519, 519 (2d Cir. 1974) (per curiam).

[6] 438 U.S. at 481-82 & nn.2 & 3. With some overlap, the defendants may be divided into four groups: (1) those officials responsible for initiating the prosecution (Assistant Secretary of Agriculture, CEA; Act Administrator, CEA; Counsel, United States Department of Agriculture; Auditor, CEA; Director, Compliance, CEA; Deputy Directory, Registration and Audit, CEA; New York Administrator, CEA); (2) those officials responsible for initiating the investigation; (3) those officials responsible for the audit; and (4) the Chief Hearing Examiner, United States Department of Agriculture. Defendant-Appellees' Petition for Rehearing and Suggestion of Rehearing En Banc at 10, Economou v. United States Dept. of Agriculture, 535 F.2d 688 (2d Cir. 1976), *vacated and remanded*, 438 U.S. 478 (1978). The Secretary of Agriculture had no involvement with the case, having delegated his authority to the Judicial Officer who

The complaint sought damages for common law torts and violations of Economou's constitutional rights,[7] and an injunction against continuation of the administrative proceeding.[8] Economou alleged that the administrative complaint had issued improperly and without cause, thereby depriving him of property without due process.[9] The complaint also alleged that the prosecution was a retaliatory gesture designed to punish Economou for his previous severe criticism of the defendants' regulatory operations, and was therefore violative of the plaintiff's first amendment rights.[10] The district court dismissed the suit against the individual defendants on the ground that they were entitled to absolute immunity since the challenged conduct involved discretionary acts within the outer limits of their authority.[11] The court also dismissed the claims against the agency defendants finding the doctrine of sovereign immunity a bar to suit.[12]

---

merely affirmed the decision of the Chief Hearing Examiner. Affidavit of Richard W. Davis, Jr., attorney, Commodity Exchange Authority, sworn to February 11, 1972, Economou v. United States Dept. of Agriculture, No. 72-478 (S.D.N.Y. April 20, 1972) (in opposition to Economou's first motion for a preliminary injunction).

[7] An amended complaint referred to in the Supreme Court's opinion alleged ten causes of action; the first five of which were considered constitutional and the latter five common law: (1) deprivation of due process since the proceedings were instituted without proper notice when the plaintiff was no longer subject to the Department's authority; (2) illegal prosecution since, in excess of discretionary authority, defendants proceeded against Economou when he was no longer subject to the Department's authority; (3) violation of first amendment rights; (4) invasion of privacy and deprivation of due process since defendants exceeded their authority by making public the agency complaint without also providing plaintiff's answers; (5) violation of plaintiff's due process rights by issuance of a false press release; (6) abuse of legal process; (7) malicious prosecution; (8) invasion of privacy; (9) negligence; and (10) trespass. 438 U.S. at 482-83 & n.5.

[8] *Id.* at 481. Two requests for a preliminary injunction were denied by District Court Judge MacMahon. Economou v. United States Dept. of Agriculture, No. 72-478 (S.D.N.Y. April 20, 1972); Economou v. United States Dept. of Agriculture, No. 72-478 (S.D.N.Y. January 5, 1973). On March 31, 1975, subsequent to a separate Second Circuit decision vacating the order of the Department of Agriculture's Judicial Officer, see note 5 *supra*, Economou filed a second amended complaint which was the subject matter of this suit. 438 U.S. at 481-82.

[9] *Id.* at 482-83. In support of this allegation, Economou stated that his firm no longer engaged in activities regulated by the defendants; that he was prosecuted without notice and warning; that he was defamed in a deceptive press release; and that the defendants made public the administrative complaint without also making available his answers. *Id.*

[10] *Id.* at 482.

[11] Economou v. United States Dept. of Agriculture, No. 72-478, slip op. at 6 (S.D.N.Y. May 22, 1975). The district court relied on the Supreme Court's decision in Barr v. Matteo, 360 U.S. 564, 565, 572-74 (1959), granting absolute immunity to federal executive officials performing discretionary acts within the scope of their authority regardless of motivation. *Economou*, slip op. at 2-3 & n.3.

[12] Economou v. United States Dept. of Agriculture, No. 72-478, slip op. at 2 (S.D.N.Y. May 22, 1975). The doctrine of sovereign immunity states that the government cannot be sued in its own courts unless it has so consented. Although the Federal Torts Claims Act, 28 U.S.C. §§ 2671-2680 (1976), constitutes consent by the United States to suit in certain cases, the United States has not consented to suit against these federal agencies in their own name. *Economou*, slip op. at 2.

On appeal, the United States Court of Appeals for the Second Circuit recognized that the district court had correctly applied the doctrine of absolute immunity as it had previously been applied to federal officials.[13] Nevertheless, the court decided to consider the possibility that absolute immunity was not mandatory.[14] The Second Circuit based its decision to reconsider absolute immunity for federal officials on its reading of recent Supreme Court decisions[15] which accorded only a qualified immunity to state executive officials sued for deprivation of an individual's constitutional rights under section 1983.[16] The qualified immunity accorded in these section 1983 cases protects state officials only when they act in good faith and with reasonable grounds to believe that their actions are constitutional.[17] The Second Circuit maintained there should be no distinction between the level of immunity afforded state officials in suits brought under section 1983 and that afforded federal officials in suits brought under the United States Constitution, since both actions serve the identical purpose of protecting citizens from violations of their constitutional rights by government officials.[18] Consequently, it ruled that federal executive officials were entitled to only qualified immunity for constitutional violations.[19] The court also determined that none of the defendants' functions were analogous to those of state prosecutors and judges, who are absolutely immune from section 1983 damages liability,[20] and, accordingly, that none of the defendants were entitled to the protection of the absolute immunity granted prosecutors and judges.[21] Consequently, the Second Circuit reversed the district court's dismissal of Economou's complaint as to the individual defendants, and remanded the case to the district court for application of the principles of qualified immunity.[22]

---

[13] Economou v. United States Dept. of Agriculture, 535 F.2d 688, 691 (2d Cir. 1976).

[14] *Id.*

[15] Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974); Pierson v. Ray, 386 U.S. 547 (1967).

[16] 42 U.S.C. § 1983 (1976). Section 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

[17] Economou v. United States Dept. of Agriculture, 535 F.2d 688, 692-93 (2d Cir. 1976).

[18] *Id.* at 695 n.7.

[19] *Id.* at 696.

[20] Imbler v. Pachtman, 424 U.S. 409, 427 (1976) (prosecutor); Pierson v. Ray, 386 U.S. 547, 553-55 (1967) (judge).

[21] Economou v. United States Dept. of Agriculture, 535 F.2d 688, 696 & n.8 (2d Cir. 1976). The court based this conclusion on the finding that agency actions turn more on documentary proof than on the veracity of witnesses, and that the defendants' work did not generally involve the same constraints of time and information that are present in criminal cases. *Id.* at 696 n.8.

[22] *Id.* at 697.

The United States Supreme Court granted certiorari,[23] and in a five to four decision HELD: Federal executive officials performing discretionary functions are entitled only to a qualified immunity for infringements of individuals' constitutional rights,[24] while federal executive officials performing judicial and quasi-judicial functions in federal agency proceedings are entitled to absolute immunity.[25] Justice White, writing for the majority,[26] first noted the government's contention that all of the federal officials in *Butz* were absolutely immune even if they had knowingly and deliberately infringed Economou's constitutional rights.[27] In considering this contention, the majority pointed out the potential conflict between the doctrine of official immunity and the importance of vindicating constitutional rights.[28] In particular, the Court cited its recognition in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*[29] of a cause of action under the fourth amendment against officials who deprive individuals of their constitutional rights.[30] The Court indicated its belief that clothing federal officials with absolute immunity would undermine the *Bivens* cause of action, and noted that circuit court decisions had unanimously called for qualified immunity.[31]

The Court next considered whether prior case law mandated absolute immunity in constitutional cases. In previous decisions, the Supreme Court accorded federal officials absolute immunity from civil suits so long as they performed discretionary acts within the scope of their authority.[32] The Court stated, however, that its holdings in the principal cases of *Spalding v. Vilas*[33]

---

[23] 429 U.S. 1089 (1977).

[24] 438 U.S. at 507.

[25] *Id.* at 512-13.

[26] *Id.* at 480. Justice White's opinion was joined by Justices Blackmun, Powell, Marshall, and Brennan. *Id.* Chief Justice Burger and Justices Stevens, Stewart, and Rehnquist concurred and dissented in an opinion written by Justice Rehnquist. *Id.* at 517.

[27] *Id.* at 485.

[28] *Id.* at 485-86.

[29] 403 U.S. 388 (1971). In *Bivens,* the Court held that a violation of the fourth amendment by federal agents gives rise to a cause of action for damages resulting from the unconstitutional conduct. *Id.* at 397. The *Bivens* cause of action has been extended to other constitutional claims, in particular, fifth amendment due process claims. *E.g.,* United States *ex rel.* State Marine Lines, Inc. v. Shultz, 498 F.2d 1146, 1156-57 (4th Cir. 1974) (fifth amendment); Moore v. Koelzer, 457 F.2d 892, 894 (3d Cir. 1972) (fifth amendment); Butler v. United States, 365 F. Supp. 1035, 1039 (D. Hawaii 1973) (first amendment).

[30] 438 U.S. at 485.

[31] *Id.* at 486 & n.9.

[32] Barr v. Matteo, 360 U.S. 564, 572-74 (1959); Spalding v. Vilas, 161 U.S. 483, 498 (1896).

[33] 161 U.S. 483 (1896). *Spalding* held that the Postmaster General was not liable for an injury resulting from acts performed pursuant to statutory directive, even if there was a malicious subjective intent. *Id.* at 498-99. The Postmaster General, in executing the directives of a statute, had issued a circular among the postmasters, which was allegedly injurious to the plaintiff's reputation and contractual relationships. *Id.* at 484-86.

and *Barr v. Matteo*[34] did not mandate a finding of absolute immunity in all cases, because those decisions depended on a finding that the officers were within the scope of their authority.[35] The *Butz* Court further noted that allegations that the officer violated statutory or constitutional limits on the scope of his authority were absent from *Barr* and *Spalding*.[36] Thus, the Court reasoned that although those cases granted absolute immunity to officials performing acts related to the duties of their office, they did not immunize officials who ignore limitations imposed on their authority by law.[37] Accordingly, the *Butz* Court was "confident that prior cases did not purport to protect an official who has not only committed a wrong under local law, but has also violated those fundamental principles of fairness embodied in the Constitution."[38]

The Court supported its interpretation of *Barr* and *Spalding* by reference to other cases holding that an official is not entitled to absolute immunity where he transgresses his statutory authority.[39] The Court took these cases one step further, reasoning that "if officers are accountable when they stray beyond the plain limits of their statutory authority, it would be incongruous to hold that they may nevertheless willfully or knowingly violate constitutional rights without fear of liability."[40] Hence, the Court implicitly concluded that federal executive officials who violate individuals' constitutional rights have stepped outside the scope of their authority, and are no longer entitled to absolute immunity.

Having concluded that officials who violate the constitutional rights of individuals are not entitled to absolute immunity, the Court next considered what level of immunity is appropriate. In this regard, the Court first considered cases extending only a qualified immunity to state executive officials sued under section 1983 for violations of individuals' constitutional rights.[41] The Court maintained that this standard of qualified immunity should logi-

---

[34] 360 U.S. 564 (1959). *Barr* held that a defamatory press release, the issuance of which was clearly within the authority of the Acting Director of the Office of Rent Stabilization, was not actionable even if issued maliciously. *Id.* at 574-75.

[35] 438 U.S. at 489-95.

[36] *Id.* at 492-95.

[37] *Id.* at 489-95.

[38] *Id.* at 495.

[39] Id. at 490. *See* Bates v. Clark, 95 U.S. 204, 209 (1877) (officer who seized liquor outside of authorized territory liable in conversion); Little v. Barreme, 6 U.S. (2 Cranch) 170, 179 (1804) (commander of American warship liable for seizure of another ship when seizure was unauthorized).

[40] 438 U.S. at 495.

[41] *Id.* at 496-98. *See* Wood v. Strickland, 420 U.S. 308, 311, 322 (1975) (school board members have only a qualified immunity in a § 1983 suit alleging unconstitutional suspension of high school students); Scheuer v. Rhodes, 416 U.S. 232, 234-35, 247-48 (1974) (senior state and state university officials have only qualified immunity in § 1983 suit for unconstitutional suppression of the "Kent State" disturbance); Pierson v. Ray, 386 U.S. 547, 549, 555 (1967) (local police officers have only qualified immunity in § 1983 suit alleging unconstitutional arrest of black ministers protesting segregated facilities in a bus station waiting room).

cally apply to federal officials accused of violating individuals' constitutional rights, since an action against federal officials under the Constitution is the equivalent of an action against state officials under section 1983.[42] Justice White maintained that "to create a system where the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head."[43] Accordingly, the Court concluded that the standards governing the conduct of federal and state officials in constitutional cases should be the same.

The Court further reasoned that to accord federal officials absolute immunity from liability for constitutional claims would vitiate the *Bivens* cause of action.[44] It reasoned that absolute immunity "would seriously erode the protection provided by basic constitutional guarantees," because plaintiffs would be unable to obtain relief if all potential defendants had absolute immunity.[45] In sum, because prior case law did not mandate absolute immunity, because state executive officials are not absolutely immune, and because of the importance of vindicating constitutional rights, the Court accorded federal executive officials only a qualified immunity for infringements of individuals' constitutional rights.[46]

Having concluded that qualified immunity is the general rule for constitutional claims against federal officials, the Court then examined the Second Circuit's conclusion that none of the federal officials were entitled to absolute immunity.[47] The Court stated that the general rule of qualified immunity would be subject to exceptions where it could be shown that absolute immunity is essential for the conduct of the public business.[48] Specifically, the *Butz* Court considered the policy of protecting the integrity of the judicial process by granting absolute immunity to certain participants in a judicial proceeding to be equally applicable to executive agency officials who perform similar adjudicatory functions—those who preside over, initiate, or prosecute an administrative agency proceeding.[49] The Court thus rejected the Second Circuit's distinction between those officials who perform adjudicatory func-

---

[42] 438 U.S. at 500-01.

[43] *Id.* at 504.

[44] *Id.* at 501-04.

[45] *Id.* at 505. No relief would be available from the government because the Federal Tort Claims Act prohibits recovery for injuries stemming from discretionary acts, even when that discretion has been abused. 28 U.S.C. § 2680(a) (1976).

[46] 438 U.S. at 507.

[47] *Id.* at 508-17.

[48] *Id.* at 507. The Court thus approved a number of its prior decisions holding judges and quasi-judicial officers absolutely immune from liability because of the importance of their role in the judicial process. *Id.* at 508-11. *See* Imbler v. Pachtman, 424 U.S. 409 (1976) (state prosecutor); Yaselli v. Goff, 275 U.S. 503 (1927), *aff'g mem.*, 12 F.2d 396 (2d Cir. 1926) (federal prosecutor); Bradley v. Fisher, 80 U.S. (13 Wall) 335 (1872) (federal judge). *See also* Pierson v. Ray, 386 U.S. 547 (1967) (state judge). Justice White stated that the high degree of contentiousness in such proceedings and the need for fearless administration of the law necessitate absolute immunity for judicial and quasi-judicial officers. 438 U.S. at 512.

[49] *Id.* at 512-17.

tions in a judicial proceeding and those who perform adjudicatory functions in an agency proceeding.[50] Therefore, while denying the defendants' claim of absolute immunity insofar as it was based on the performance of discretionary functions, the Court upheld the claim of absolute immunity for those defendants performing quasi-judicial functions.[51] The Court then remanded the case to the Second Circuit for application of these principles to the remaining defendants.[52]

In an opinion concurring in part and dissenting in part, Justice Rehnquist, joined by three justices,[53] concurred in the majority's holding that "persons performing adjudicatory functions within a federal agency" are entitled to absolute immunity, but dissented on four grounds from the holding that other federal officials who violate the Constitution are entitled to only qualified immunity.[54] First, the dissent maintained that under prior law the functional scope of the official's authority was the only issue relevant to the question of immunity. Contrary to the majority's reading of prior law, the dissent stated that an official who acts within the scope of his authority is not reduced to the protection of only a qualified immunity when he is alleged to have violated a constitutional right.[55] In Justice Rehnquist's view, an officer is entitled to absolute immunity "when engaged in the discharge of duties imposed upon the official by law," even if the action is unconstitutional.[56] Since federal officials may violate constitutional rights when acting within the scope of their authority, the dissent concluded that the Court had improperly denied them absolute immunity.[57]

Second, the dissent contended that the absolute immunity rule of *Barr* and *Spalding* is necessary to ensure that federal executive officials conduct

---

[50] *Id.* at 511. See text and notes 21-22 *supra.*

[51] *Id.* at 512-13.

[52] *Id.* at 517. On remand, the district court divided the defendants into three groups: The first group included those CEA officials who commenced the disciplinary proceedings against Economou without sending him the customary warning letter. The claims against them were treated as common law causes of action for malicious prosecution. The court held that *Butz* created a distinction between common law and constitutional claims, with the latter still governed by absolute immunity. As the officials were performing discretionary acts within the scope of their authority, the court held them absolutely immune. The second group included those CEA officials who reviewed the audit of Economou's financial records and participated in the decision to commence disciplinary proceedings against him. The court held these officials absolutely immune from constitutional tort claims as they were performing the quasi-judicial functions for which *Butz* specified there would be an exception from the general rule of qualified immunity. The third group included two CEA auditors who allegedly falsified the results of their audit in an effort to cause commencement of the CEA proceeding. These officials were held to have only a qualified immunity and to be potentially liable under an implied right of action for chilling Economou's first amendment rights. Economou v. Butz, 47 U.S.L.W. 2598, 2602-03 (S.D.N.Y. 1979).

[53] 438 U.S. at 517. Justice Rehnquist's opinion was joined by Chief Justice Burger, and Justices Stevens and Stewart. *Id.*

[54] *Id.* at 517-18. (Rehnquist, J., concurring and dissenting).

[55] *Id.* at 520.

[56] *Id.* at 520-21 (quoting Spalding v. Vilas, 161 U.S. 483, 498 (1896)).

[57] *Id.* at 520-22.

fearlessly the operations of government.[58] Justice Rehnquist stated that this rule should apply in every case, and maintained that the balance attempted to be struck by qualified immunity is unworkable in practice.[59] Third, the dissent asserted that even if qualified immunity is desirable, the Court's opinion created an illusory distinction between the level of immunity afforded constitutional violations and that afforded common law torts,[60] since many common law claims can be termed a deprivation of due process.[61] Therefore, the dissent considered the distinction between common law and constitutional claims untenable. Lastly, the dissent contended that maintaining a distinction between federal immunity under the Constitution and state immunity under section 1983 is logical because Congress evidenced its intent to bring state officials under its control by passage of section 1983, but had taken no such action with respect to federal officials.[62] For these four reasons, Justice Rehnquist maintained that absolute immunity is a sound rule for damage suits against federal officials, regardlesss of the nature of the claim.[63]

The significance of the *Butz* case is fourfold. First, the majority of federal executive officials will hereafter enjoy only a qualified immunity when sued for violations of an individual's constitutional rights.[64] Second, *Butz* establishes uniformity between the level of immunity accorded state and federal executive officials sued for constitutional violations.[65] Third, the Court potentially redefined the test for applying immunity with respect to constitutional claims, since merely acting within the traditional scope of authority no longer provides an officer with absolute immunity in this area.[66] The Court did not address the question whether officials are absolutely immune from liability for common law claims,[67] but rather left that area potentially governed by absolute immunity. Finally, the Court reaffirmed the principle of absolute immunity for those officials performing judicial and quasi-judicial functions, and extended it to officials performing adjudicatory functions within federal agencies.[68]

This casenote will first discuss the doctrines of absolute and qualified immunity as they existed prior to *Butz*. This discussion will be followed by a treatment of the precedential and theoretical problems created by the *Butz* decision. The level of immunity properly accorded federal officials in constitutional cases will be analyzed next. It will be submitted that despite the precedential and theoretical problems, qualified immunity best serves both public and private interests, subject to the appropriate exception for federal

---

[58] *Id.* at 527-30.
[59] *Id.*
[60] *Id.* at 522.
[61] *Id.*
[62] *Id.* at 525-26.
[63] *Id.* at 530.
[64] *Id.* at 507.
[65] *Id.* at 500-01, 507.
[66] See text at notes 88-131 *infra*.
[67] 438 U.S. at 495 n.22.
[68] *Id.* at 508-17.

officials performing adjudicatory functions in agency proceedings. Lastly, the probable distinction between constitutional and common law claims created by *Butz* will be discussed and criticized as untenable and unwarranted. It will be submitted that the Court should move in the future to a general rule of qualified immunity for executive officials in all cases.

I. Absolute and Qualified Immunity Prior to *Butz*

In determining whether the *Butz* decision is supportable on precedential and policy grounds, it is important to understand the definitions of absolute and qualified immunity and the justifications that have traditionally been urged as support for their application. Prior to *Butz*, the doctrine of absolute immunity applied and protected federal officials from liability whenever the official established that the challenged conduct was a discretionary act[69] within the scope of his authority.[70] Scope of authority was defined as involving those matters committed by law to the officer's control or supervision.[71] The motivation for the official's conduct was irrelevant to this inquiry.[72] Two basic rationales supported the doctrine of absolute immunity for government officials. The first rationale was that public servants will be hampered and intimidated unduly in the discharge of their duties if faced with a lawsuit as a result of harm caused to an individual.[73] This rationale holds that the public official should be able to perform his duties without fear he will later have to satisfy a jury that he acted in a good faith belief that his action was the best course of action, and that his action was not the result of an intent to harm the plaintiff.[74] Accordingly, absolute immunity was viewed as necessary to promote "the fearless, vigorous, and effective administration of policies of government."[75]

---

[69] Traditionally, the level of immunity available to federal officials for their actions has depended on whether the challenged conduct is discretionary as opposed to ministerial. *See* W. Prosser, Law of Torts § 132 (4th ed. 1971); Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 Harv. L. Rev. 209, 218-19 (1963). Discretionary acts involve the exercise of judgment, while ministerial acts cover situations where the officer's course of action is clearly circumscribed by statute, regulation, or rule. Accordingly, when performing ministerial functions, the official is required to act mechanically and in a specific manner. Prosser, *supra*, at § 132. Ministerial acts are accorded no immunity on the premise that when an official has only one possible course of action open to him under a statute, rule, or regulation, there is no excuse for a failure to carry out such duties properly. Jaffe, *supra*, at 218.

[70] Prosser, *supra* note 69, at § 132.

[71] *See, e.g.*, *Butz*, 438 U.S. at 517 (Rehnquist, J., concurring and dissenting); Spalding v. Vilas, 161 U.S. 483, 498 (1896).

[72] *See* Barr v. Matteo, 360 U.S. 564, 575 (1959).

[73] Barr v. Matteo, 360 U.S. 564, 571 (1959); Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

[74] Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). In *Gregoire*, Judge Learned Hand gave the classic formulation of this rationale for absolute immunity: "Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith." *Id.*

[75] Barr v. Matteo, 360 U.S. 564, 571 (1959).

The second rationale for absolute immunity focused on "the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required by the legal obligations of his position, to exercise discretion."[76] This rationale rested on the theory that the officer wronged the plaintiff only because he exercised his judgment in accordance with his responsibilities as a public official and not because of any bad faith.[77] Its basic assumption was that it is better to immunize some officials undeserving of protection than to subject all officials to the potential uncertainty of a lawsuit, thereby hindering the conduct of the public business.[78] Absolute immunity before *Butz* thus worked to protect an official who has performed discretionary acts within the scope of his authority on the grounds that the rule was necessary to be fair to the official and to ensure efficient and decisive government.

Prior to *Butz*, the Supreme Court had extended absolute immunity to all federal officials, regardless of rank.[79] By contrast, state executive officials enjoyed only a qualified immunity.[80] While absolute immunity protected the federal official whenever he was within the scope of his authority, qualified immunity set forth two standards which, if demonstrated, would cause the state officer to lose his immunity. Under qualified immunity, the official lost his immunity if he failed to satisfy either a subjective test of good faith, or an objective test of reasonable grounds to believe that his action was justified.[81] Qualified immunity was premised on the assumption that society should give protection only to those officers who have acted properly.[82] The theory of qualified immunity therefore rejected the hypothesis that the public interest requires immunizing undeserving officials in order to protect those who acted with good intentions.

In the context of a constitutional claim, such as the claim faced by the *Butz* Court, the concept of qualified immunity had a more specifically defined meaning under prior law. This qualified immunity applied to state executive officials sued for deprivation of an individual's constitutional rights under section 1983.[83] The defendant officer was presumed to have acted in bad faith when the constitutional right in question was clearly established. Consequently, in such cases, the official was denied immunity.[84] If the constitutional right in question was not clearly established, however, the officer could claim immunity if he proved that he acted in good faith and that he had

---

[76] Scheuer v. Rhodes, 416 U.S. 232, 240 (1974).

[77] Barr v. Matteo, 360 U.S. 564, 571-72 (1959) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950)).

[78] *Id;* 438 U.S. at 530 (Rehnquist, J., concurring and dissenting).

[79] Barr v. Matteo, 360 U.S. 564, 573 (1959).

[80] *See* PROSSER, *supra* note 69, at § 132. *See* Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974); Pierson v. Ray, 386 U.S. 547 (1967).

[81] Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974).

[82] Barr v. Matteo, 360 U.S. 564, 588 (Brennan, J., dissenting). Justice Brennan eloquently argued that absolute immunity extinguishes the wronged individual's interest and runs contrary to the "deep-rooted policy of the common law generally to provide redress . . . ." *Id.*

[83] See cases at note 80 *supra*.

[84] Wood v. Strickland, 420 U.S. 308, 322 (1975).

reasonable grounds to believe that his action was constitutional.[85] Qualified immunity thus operated to protect the officer only if he acted in good faith, did not deprive the plaintiff of a clearly established constitutional right in so doing, and had a reasonable belief in the constitutionality of his actions.[86] If these prerequisites were not met, the theory of qualified immunity mandated that the plaintiff's interest in redress should take precedence over both the officer's need for protection and society's interest in effective government.[87] Qualified immunity thus sought to balance the competing interests of redress for the plaintiff, on the one hand, with those of fairness to the officer and ensuring the fearless and efficient administration of the public business, on the other hand.

Consequently, before *Butz,* absolute immunity protected all federal officials who performed discretionary acts within the scope of their authority. Qualified immunity, as enunciated in the context of state officials, recognized the need to protect both officials and the operations of government by giving officials more protection from damage actions than any private individual would have. Nevertheless, the doctrine protected only state officers who had acted properly. Hence, qualified immunity, by allowing the plaintiff to recover in some situations, has given some recognition to his interest in redress.

II. Precedential and Theoretical Problems of *Butz*

The *Butz* Court concluded that qualified immunity is the proper level of immunity for federal officials who violate individuals' constitutional rights in the course of performing discretionary functions within the scope of their authority.[88] Although that decision may be supportable on policy grounds, the precedential and theoretical underpinnings of the decision are questionable. These problems arise from the difficulty in reconciling *Butz* with the previous two major decisions on federal executive immunity, *Spalding v. Vilas*[89] and *Barr v. Matteo.*[90] Since an application of the principles of these cases to *Butz* would mandate a holding of absolute immunity, the Court has made a change in immunity law. The change appears to be either in the definition of the traditional prerequisite for immunity—acting within the scope of authority—or in the level of immunity which is operative when the official is within the scope of his authority. Consequently, one must examine pre-*Butz* definitions of scope of authority and the levels of immunity that applied when an officer was either within or without that scope in order to determine which of these concepts *Butz* has changed. It will be demonstrated that the *Butz* Court has not changed the meaning of scope of authority, but rather has altered the level of immunity that is operative within that scope.

In the 1896 *Spalding* decision, the Court defined the scope of a federal official's authority as encompassing any action "having more or less connec-

---

[85] *Id.*
[86] *See* Pierson v. Ray, 386 U.S. 547, 557 (1967).
[87] *Barr,* 360 U.S. at 588 (Brennan, J., dissenting).
[88] 438 U.S. at 507.
[89] 161 U.S. 483 (1896).
[90] 360 U.S. 564 (1959).

tion with the general matters committed by law to [the officer's] control or supervision."[91] *Spalding* involved a suit against the Postmaster General, who in carrying out the statutory duties of his office had issued a circular among the postmasters which was allegedly injurious to the plaintiff's reputation and contractual relationships.[92] The *Spalding* Court recognized the traditional rule that an officer acting outside the scope of his authority has no immunity at all.[93] The Court found that the Postmaster had acted within the scope of his authority and held all Cabinet-level federal officials absolutely immune for acts that fell within that scope.[94] The *Spalding* immunity doctrine, therefore, was rather straightforward and gave no indication of any rule other than one granting absolute immunity when the officer acted within the scope of authority, and denying immunity when he acted outside that scope.

The Supreme Court's 1959 decision in *Barr* extended the absolute immunity rule of *Spalding* beyond Cabinet-level officials to all members of the federal executive branch, regardless of rank.[95] Before *Barr,* lower-level officials had only qualified immunity.[96] In *Barr,* the Court held that the Acting Director of the Office for Rent Stabilization was absolutely immune from suit on an allegedly defamatory press release which the plaintiff contended was issued in bad faith.[97] The Court found the press release to be within "the outer perimeter of the official's line of duty" and "an appropriate exercise of discretion," thus placing the defendant within the scope of his authority.[98] Accordingly, the Court felt that absolute immunity was mandatory.[99] Therefore, after *Barr,* all federal executive officials performing authorized acts were absolutely immune from suit. This was true regardless whether their action caused injury, was a particular type of alleged injury, or was motivated by bad faith.[100] All acts outside the officer's scope of authority were given no immunity protection. The *Barr* rule thus was based on the same premise as *Spalding,* and merely applied that premise to all federal officials, regardless of rank. Therefore, after *Barr,* the Supreme Court left no area where qualified immunity would apply. In so doing, it sided wholly with the advocates of

---

[91] 161 U.S. at 498.

[92] *Id.* at 484-86.

[93] *Id.* at 498. The Court stated that there would be no immunity for acts "manifestly or palpably beyond [the officer's] authority." *Id.*

[94] *Id.*

[95] 360 U.S. at 573.

[96] *See,* PROSSER, note 69 *supra,* at § 114.

[97] 360 U.S. at 565.

[98] *Id.* at 575. The press release announced the discharge of the plaintiff and an associate, who together had organized a plan whereby employees of the agency received annual leave settlements and were returned to agency employment on a temporary basis. This plan was devised on the eve of, and on account of, an uncertain congressional renewal of the agency's mandate to continue in existence. The press release allegedly intimated that the two agency employees had devised an immoral plan which if not violative of the letter of the law, violated its spirit. *Id.* at 565-68 & nn. 4 & 5.

[99] *Id.* at 575.

[100] *See* PROSSER, note 69 *supra,* at § 132.

absolute immunity for all federal officials, rejecting the balancing of interests inherent in the rationale of qualified immunity.

Under the rule of *Spalding* and *Barr*, the *Butz* district court appears justified in its conclusion that all of the *Butz* defendants were entitled to absolute immunity. The Secretary of Agriculture and his various subordinates in the Department of Agriculture and the Commodity Exchange Authority were entitled to investigate commodity exchange merchants and to initiate proceedings designed to revoke or suspend the merchants' registrations if the officials found them to be in violation of the Department's regulations.[101] The defendants were performing functions intimately connected with the duties of their offices. Their actions were clearly not unauthorized. Under prior law, absolute immunity seems to be the mandatory result. Therefore, the *Butz* Court has changed either the meaning of scope of authority or the level of immunity which is operative within it. It will be shown that it has done the latter.

In holding that certain federal officials would now be entitled only to qualified immunity, the *Butz* Court did not claim to be overruling either *Barr* or *Spalding*. Instead, the Court distinguished them by noting that neither case involved a situation where a statutory or constitutional limit on the officer's authority was violated. The Court implied that the failure to send Economou a warning letter violated his statutory rights.[102] The Court also assumed that the attempt to suspend Economou's registration violated his constitutional rights in that it allegedly deprived him of property without due process.[103] This statutory and constitutional limitation represents a departure from the traditional meaning of scope of authority which was defined not from the point of view whether a constitutional or statutory rule was violated, but from whether the act, improper or not, illegal or not, unconstitutional or not, was at all reasonably related to the duties of the office.[104]

---

[101] *See* 7 U.S.C. § 12 (1976). This power has since been vested in the Commodities Futures Trading Commission. *Id.*

[102] 438 U.S. at 493. The Court's implication of a statutory violation can be found when it attempts to distinguish *Spalding* by stating that *Spalding* did not involve "a mistake of either law or fact in construing or applying a statute." *Id.* This analysis is subject to criticism on several grounds. First, since the sending of the warning letter is merely "customary" not mandatory, no statutory provision was violated by the Department. Economou v. United States Dept. of Agriculture, 494 F.2d 519, 519 (2d Cir. 1976). The disciplinary procedures of the Department contain no requirement that a warning letter be sent. *See* 7 U.S.C. § 9 (1976). However, the fact that such warning letters were usually sent evidently weighed quite heavily in the Second Circuit's vacating of the Judicial Officer's order. *See* Economou v. United States Dept. of Agriculture, 494 F.2d 519, 519 (1976). Second, even if there were a statutory violation under prior law, it would not place the defendants outside the scope of their authority. *See Spalding*, 161 U.S. at 498. All of these actions still were more or less connected to general matters committed by law to the defendants' supervision or control. Therefore, if the defendants did step outside the scope of their authority, they did so by allegedly violating Economou's constitutional rights.

[103] 438 U.S. at 483.

[104] *Barr*, 360 U.S. at 573-74; *see Spalding*, 161 U.S. at 498.

Such a definition of scope of authority is hard to reconcile with *Spalding* and *Barr*. The opinion in *Spalding* gives no indication that only qualified immunity would have been accorded the official had his actions transgressed a constitutional limitation on his authority.[105] *Spalding* also says that bad faith will not defeat a claim of absolute immunity.[106] Justice Rehnquist is correct in stating that "*Spalding* clearly and inescapably stands for the proposition that high ranking executive officials acting within the outer limits of their authority are absolutely immune from suit."[107] In addition, *Barr* states that when the defendants act within the scope of their authority they are entitled to absolute immunity and gives no indication of a different rule for allegedly unconstitutional acts.[108] The defendants in *Butz* were clearly within the outer perimeter of their authority to investigate and enforce regulatory sanctions against commodity futures merchants. An allegation of a deprivation of due process or the failure to send the customary warning letter to Economou does not place the defendants outside the scope of their authority as that concept was used in *Spalding* and *Barr*. For an officer to be outside the scope of his authority as that term was defined before *Butz*, his actions would have to be completely unrelated to his office.

The Court harmonized its holding in *Butz* with the precedents of *Barr* and *Spalding* by stating that when an officer violates a constitutional rule he has overstepped the bounds of his authority. This rationalization raises the question whether the Court is granting qualified immunity where no immunity existed before. No immunity, qualified or otherwise, has ever been granted officials who are outside the scope of their authority.[109] The Court certainly cannot be holding that an official, acting wholly outside the scope of his authority, is granted a qualified instead of no immunity if he violates someone's constitutional as opposed to common law rights. Such a result would turn the Court's emphasis on the importance of constitutional rights on its head, and it is implausible that the *Butz* Court intended this.

That the Court did not intend to accord executive officials accused of constitutional violations a qualified immunity when they act outside the scope of their authority, as it has been defined traditionally, is indicated by its use of prior case law. The Court's starting point was that immunity was appropriate when the official acted within the scope of his authority, but that no immunity

---

[105] *See Spalding*, 161 U.S. at 498-99.

[106] *Id.* at 498. It may be contended that if the cause of action in *Spalding* is not viewed as a tort action, but rather as a question of legitimate government activity carried out by an authorized employee, its statement that motive is irrelevant would not have been a major break from precedents such as Kendall v. Stokes, 44 U.S. (3 How.) 87, 99 (1845), which predicated immunity on good faith. However, the effect of *Spalding* has been to increase the immunity available to public officials, as may be evidenced by the Court's reliance on *Spalding* in *Barr*, 360 U.S. at 570-74. *See* Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 51-52 (1972).

[107] 438 U.S. at 519. (Rehnquist, J., concurring and dissenting).

[108] 360 U.S. at 575.

[109] Little v. Barreme, 6 U.S. (2 Cranch) 170, 178-79 (1804); Bates v. Clark, 95 U.S. 204, 209 (1877). *See* PROSSER, *supra* note 69, at § 132.

should be accorded when he is outside that scope. *Little v. Barreme,*[110] decided in 1804, and *Bates v. Clark,*[111] decided in 1877, clearly set forth the principle that an official has no immunity when his acts are unauthorized. The Court used these decisions to support its proposition that the law has never accorded absolute immunity to federal officials in all contexts.[112] In both of these cases, unlike the officials' acts in *Butz,* the alleged acts did not have "more or less connection with the general matters committed by law to the officer's control or supervision,"[113] and, therefore, a claim of immunity was unsupportable. The Court then referred to the 1845 case of *Kendall v. Stokes*[114] and the 1849 case of *Wilkes v. Dinsman*[115] to indicate its belief that unauthorized conduct will not be given any immunity protection.[116] In these two cases, the officers were acting within the scope of their authority and were granted immunity.[117] Since the Court made no effort to distinguish these cases from *Butz* and used them to support its refusal to apply absolute immunity, one can infer that it did not intend to depart from the traditional rule that acting within the scope of authority is a prerequisite for any immunity, qualified or absolute.

The conclusion that the *Butz* Court did not intend a decision which would grant immunity to officials for previously unprotected action finds further support in the Court's reliance on the section 1983 cases,[118] where defendants were not performing acts wholly unrelated to their positions.[119] Since the Court relied on these decisions in several respects,[120] it is reasonable to as-

---

[110] 6 U.S. (2 Cranch) 170 (1804). In *Little* the commander of an American warship was held strictly liable for seizure of a Danish cargo ship. The authorizing statute allowed seizure only of ships going *to* French ports. The President, however, had authorized the seizure of suspected vessels whether going to or from French ports. The Court held that the President could not expand the scope of the statute, and since the seized ship was en route *from* a French port, that the seizure was without authority. *Id.* at 176-78.

[111] 95 U.S. 204 (1877). In *Bates* the relevant statute authorized seizure of alcoholic beverages in Indian country. Since the seizure did not take place in Indian country, the transporting officer was held strictly liable in conversion. *Id.* at 205, 209.

[112] 438 U.S. at 490.

[113] *Spalding,* 161 U.S. at 498.

[114] 44 U.S. (3 How.) 87 (1845). In *Kendall,* the Postmaster General was held immune for a good faith error in judgment in suspending payment to a creditor of the post office. The Court said that the officer was not liable in damages if he fell into error provided he "acted from a sense of public duty and without malice." *Id.* at 99.

[115] 48 U.S. (7 How.) 89 (1849). In *Wilkes,* the commanding officer of a marine squadron was held immune from liability for illegally detaining a marine beyond the term of his enlistment because the error was neither malicious nor willful. *Id.* at 130-31.

[116] *See* 438 U.S. at 491-92. The *Kendall* and *Wilkes* requirement of good faith is impossible to reconcile with *Spalding* and *Barr. See* 438 U.S. at 519 (Rehnquist, J., concurring and dissenting).

[117] *Kendall,* 44 U.S. at 99; *Wilkes,* 48 U.S. at 130, 131.

[118] Wood v. Strickland, 420 U.S. 308 (1975); Siheuer v. Rhodes, 416 U.S. 232 (1974); Pierson v. Ray, 386 U.S. 547 (1967).

[119] See note 41 *supra.*

[120] 438 U.S. at 496-98.

sume that it also adopted their assumptions that acting within the scope of authority is a prerequisite for the qualified immunity accorded officials accused of constitutional violations therein. Therefore, the *Butz* Court did not change either the meaning of scope of authority or the necessity of acting within it to receive any immunity.

Barr and *Spalding* represent a policy decision that absolute immunity is preferable to qualified immunity and should be applied to all federal officials performing discretionary acts within the scope of their authority.[121] The *Butz* Court, while taking great pains not to overrule *Barr*,[122] nevertheless applied qualified immunity[123] in a manner which seems to conflict with the teaching of *Barr*. There are two ways to resolve this conflict. One way is to conclude that since *Butz* was only dealing with constitutional violations,[124] while *Barr* was a common law case, the Court also intends to restrict or abolish absolute immunity for executive officials when they commit common law torts as in *Barr*. The *Butz* Court's treatment of *Barr* supports such a conclusion. The Court indicated that it seriously questions *Barr*'s continuing validity, and it did everything short of expressly overruling that case. The Court also noted that *Barr* was only a plurality opinion.[125] It pointed out that *Barr* did not discuss whether the defendant's privilege would be defeated by a showing that he acted without either good faith or reasonable grounds to believe in the truth of the allegedly defamatory statement.[126] Moreover, the Court noted that the *Barr* Court could not have decided the case on the basis of a qualified immunity since the court of appeals had found sufficient evidence to support an adverse jury verdict for the defendant on that question.[127] The *Butz* Court implied, therefore, that the *Barr* Court wanted to hold the defendant immune, but was forced into a blanket rule of absolute immunity since the proceedings below made a judgment for the defendant on the grounds of qualified immunity impossible. Consequently, there is some evidence that the Court views the controlling scope of *Barr* as quite narrow, and that it will move to a general rule of qualified immunity, regardless whether the claim is constitutional or not, in the future.

A second way to reconcile *Butz* with *Barr* is to conclude that the *Butz* Court intended to depart from *Barr* only in the constitutional area. It must again be noted that the *Butz* Court did not overrule *Barr*, but distinguished it on the basis of an absence therein of a violation of a statutory or constitutional limitation on the officer's authority.[128] The Court maintained that *Barr* did no more than protect an official who had committed a wrong under local law as opposed to an official who had violated the Constitution.[129] This im-

---

[121] *Barr*, 360 U.S. at 573, 575; *Spalding* 161 U.S. at 498.
[122] 438 U.S. at 488-89 & nn. 10-13. See text at notes 125-28 *infra*.
[123] 438 U.S. at 507.
[124] 438 U.S. at 495 n.22.
[125] *Id.* at 487.
[126] *Id.* at 488.
[127] *Id.* at 487-88 nn.10 & 13.
[128] *See* 438 U.S. at 489, 495.
[129] *Id.* at 495.

plies that there can and should be different immunity standards for officials who violate the Constitution than for those who violate local tort law. Since tort law is essentially the common law of the states, the *Butz* Court has probably not altered the validity of the doctrine of *Barr* for common law claims. The Court's emphasis on vindicating constitutional guarantees of individual rights,[130] coupled with its preservation of *Barr* and *Spalding*, indicates that it feels that officials who violate individuals' constitutional rights are entitled to less immunity protection than those who commit only common law torts. Hence, absolute immunity is probably still the rule for common law tort claims brought against federal officials. Accordingly, the better way to harmonize *Butz* with *Barr* and *Spalding* is to say that the Court has in effect created a distinction between common law and constitutional claims for purposes of the doctrine of official immunity.[131]

III. Qualified Immunity for Federal Officials Performing Non-Judicial Functions

Despite the precedential and theoretical difficulties with the *Butz* Court's holding, several considerations suggest that the Court's limitation of federal executive immunity to qualified immunity in the context of constitutional claims is proper. Before turning to these considerations, it is instructive to look at the immunity granted state executive officials in suits under section 1983. In granting federal officials only qualified immunity, the *Butz* Court applied the standard developed in *Scheuer v. Rhodes*.[132] *Scheuer* held that state executive officials sued for constitutional violations under section 1983[133] are to have only qualified immunity.[134] The state officials involved were high-level state executive officials whose functions were primarily supervisory and administrative.[135] The Court considered the preservation of the section 1983 cause of action to be a compelling reason not to grant state executive officials absolute immunity in constitutional cases.[136] Since the judicial and legislative

---

[130] *Id.* at 501-05.

[131] On remand, the district court in *Butz* interpreted the Supreme Court's decision as creating the common law/constitutional distinction. See note 52 *supra*.

[132] 416 U.S. 232 (1974).

[133] For text of § 1983 see note 16 *supra*.

[134] 416 U.S. at 247-48. One commentator writing before the Court's decision in *Butz* analyzed the effect of *Scheuer* on the federal level. He pointed out three possibilities: (1) absolute immunity in all cases except for state officials sued under § 1983; (2) qualified immunity for both state and federal officials for constitutional claims, and absolute immunity for common law claims; (3) qualified immunity for all claims on the state and federal levels. Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and a Critique*, 72 Nw. U. L. Rev. 526, 547 (1977). *Butz* clearly rejects the first proposition and seems to adopt the second, leaving the door open for a later adoption of the third.

[135] 416 U.S. at 234, 247-48. The same standard was applied in Wood v. Strickland, 420 U.S. 308 (1975), to local school board members sued under § 1983 for suspending high school students who allegedly violated a school rule prohibiting possession or use of liquor at school functions. *Id.* at 322.

[136] 416 U.S. at 248. Another rationale behind these rulings was that the breadth of discretion inherent in the nature of these officials' jobs, unlike that of judicial and

branches of state governments had already been accorded absolute immunity for all types of claims,[137] only the executive branch was left. The Court in *Scheuer* correctly realized that if state executive officials also were absolutely immune, section 1983 would be emasculated.[138] All potential defendants—all state officials—would then be immune from suit under section 1983.[139] Qualified immunity for state executive officials against constitutional claims preserves the possibility that some plaintiffs deprived of their constitutional rights by state officials will be able to recover damages.[140] Consequently, the Court found qualified immunity to be the proper level of immunity for state executive officials sued for constitutional claims.[141]

The first consideration supporting qualified immunity for federal executive officials is the preservation of the *Bivens* cause of action for deprivation of constitutional rights against federal officers.[142] This may be favorably compared to the necessity of preserving the section 1983 action against state officers. *Bivens* serves the same purpose on the federal level as section 1983 does on the state level. Section 1983 is a statute designed to protect federal constitutional rights from deprivation by state officials. *Bivens* holds that such a right exists implicitly under the Constitution against federal officials.[143] In this regard, it must be noted that federal judges and legislators are absolutely immune from liability for violations of an individual's constitutional or common law rights.[144] If federal executive officials were to have absolute immunity for constitutional claims, then all potential defendants—all federal officials—would be immune from suit. A plaintiff deprived of his constitutional rights by a federal official would have a cause of action, but no one against whom he could recover. Such a result would vitiate the *Bivens* cause of action.[145] Indeed, several courts of appeals have recognized only qualified immunity for federal officials in order to preserve *Bivens*.[146] If all federal

---

quasi-judicial officers, was not broad enough to require absolute immunity. *See* Wood v. Strickland, 420 U.S. 308, 320 (1975) (absolute immunity justified only where necessary for forthright exercise of discretion); *Scheuer*, 416 U.S. at 243 (nature of an official's functions and responsibility affects level of immunity).

[137] *Pierson*, 386 U.S. at 554-55 (judge); Tenney v. Brandhove, 341 U.S. 367, 372, 376 (1951) (legislator). Although both of these claims were constitutional in nature, the reasoning and holding clearly apply to common law tort claims as well.

[138] *See Scheuer*, 416 U.S. at 248-49.

[139] *Id.*

[140] *Id.*

[141] *Id.* at 247-48.

[142] 403 U.S. at 397.

[143] *Id. Bivens* was decided in the context of a fourth amendment violation. It has been extended to other constitutional claims by lower federal courts. See note 29 *supra*. The *Butz* Court implicitly approves this extension. 438 U.S. at 485-86, 501, 504-06.

[144] Bradley v. Fisher, 80 U.S. (13 Wall) 335 (1872) (judge). Federal legislators are protected by a constitutional grant of immunity. U.S. CONST. art. I, § 6.

[145] 438 U.S. at 501.

[146] G.M. Leasing Corp. v. United States, 560 F.2d 1011, 1014-15 (10th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978) (IRS agents); Weir v. Muller, 527 F.2d 872, 873-74 (5th Cir. 1976) (IRS agents); Black v. United States, 534 F.2d 524, 527 (2d Cir. 1976) (IRS director and agents); Jones v. United States, 536 F.2d 269, 271 (8th Cir. 1976) (members of United States Attorney's office); Mark v. Groff, 521 F.2d 1376,

officials were to be absolutely immune from liability for constitutional claims, the *Bivens* cause of action would be dead, just as section 1983 would be dead if state executive officials were to have absolute immunity. Therefore, the considerations which support qualified immunity for state executive officials are equally valid in the federal context.

Another consideration supporting qualified immunity for federal executive officials against constitutional claims is that it creates uniformity between state and federal levels of immunity. A system where the prohibitions of the federal Constitution are enforced more stringently against state than federal officials is anomalous.[147] The doctrines of federalism may have some validity in that not all of the dictates of the Constitution's restrictions on the federal government have to similarly bind the states. However, with regard to those basic constitutional rights which have been held binding on the states via the fourteenth amendment, the level of immunity should not differ between federal and state officials.

A final consideration supporting qualified immunity for federal executive officials is found in the basic policy objective underlying the doctrine of qualified immunity: to give no less consideration to the plaintiff's right to redress for the wrong done to him than is necessary to ensure the official's ability to function.[148] This balance calls for qualified immunity for non-judicial executive officials.[149] A plaintiff's rights are likely to be infringed in normal executive actions since, unlike judicial officers, most executive officers do not operate under procedural restraints.[150] In addition, the absence in non-judicial proceedings of alternative remedies, such as appeals of agency adjudicatory decisions, further justifies applying qualified immunity.[151] The undesirability of absolute immunity in view of the plaintiff's right to redress is thus more compelling outside of the judicial context and analogous situations.[152]

Contrary to Justice Rehnquist's dissent,[153] qualified immunity for certain federal executive officials also presents a feasible standard for both the courts

---

1380 (9th Cir. 1975) (IRS agents); Paton v. LaPrade, 524 F.2d 862, 871 (3d Cir. 1975) (FBI agent); Brubaker v. King, 505 F.2d 534, 537 (7th Cir. 1974); Apton v. Wilson, 506 F.2d 83, 92-93 (D.C. Cir. 1974) (Attorney General, assistants, and police officers); United States *ex rel.* State Marine Lines, Inc. v. Shultz, 498 F.2d 1146, 1156-57 (4th Cir. 1974) (Secretary of the Treasury).

[147] 438 U.S. at 504.

[148] *See* Economou v. United States Dept. of Agriculture, 535 F.2d 688, 692-93 (2d Cir. 1976); Wood v. Strickland, 420 U.S. 308, 320 (1975); Scheuer v. Rhodes, 416 U.S. 232, 243-47 (1974).

[149] On the other hand, this balance calls for absolute immunity for judicial and quasi-judicial officers. Economou v. United States Dept. of Agriculture, 535 F.2d at 696. *See also* Handler & Klein, *The Defense of Privilege in Defamation Suits Against Government Executive Officials*, 74 HARV. L. REV. 44, 60 (1960) [hereinafter cited as Handler & Klein].

[150] Economou v. United States Dept. of Agriculture, 535 F.2d 688, 696 (2d Cir. 1976).

[151] The presence of these alternative remedies in the judicial context supports absolute immunity in those situations. *See* Handler & Klein, *supra* note 149, at 60.

[152] *See Barr*, 360 U.S. at 586-87 (Brennan, J., dissenting); Handler & Klein, *supra* note 149, at 60.

[153] 438 U.S. at 530 (Rehnquist, J., concurring and dissenting).

and the officials. The specific standard for qualified immunity laid down in the section 1983 case of *Wood v. Strickland*[154] rebuts much of the argument that qualified immunity will unreasonably impair the official's ability to function.[155] According to *Wood*, the official will be liable only if he "acted with such an impermissible motivation or with such disregard of the plaintiff's clearly established constitutional rights that his actions cannot reasonably be characterized as being in good faith."[156] This standard provides adequate security for an official since he will be liable for his wrongdoing only if it was clearly outrageous or in blatant disregard of a settled constitutional right.[157] Qualified immunity thus takes into consideration both the officer's need for protection and the plaintiff's need for redress.[158] Hence, a blanket absolute immunity for all acts done by executive officials is both unnecessary and unjust, and the Court's rejection of such a position is commendable.

IV. Absolute Immunity for Federal Officials Performing Adjudicatory Functions

Both the majority and the dissent in *Butz* agreed that federal agency officials performing adjudicatory functions are entitled to absolute immunity for actions within the scope of their authority. This aspect of *Butz* can best be analyzed with reference to the considerable amount of protection that has long been granted officials involved in the judicial process. Absolute immunity has traditionally been accorded to members of the state and federal judiciary, and is considered settled law.[159] Absolute immunity has also traditionally been the rule at both the state and federal levels for quasi-judicial officials such as prosecutors.[160] The functional comparability of the judgments of

---

[154] 420 U.S. 308 (1975).

[155] *But see Butz*, 438 U.S. at 520 (Rehnquist, J., concurring and dissenting); Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

[156] 420 U.S. at 322.

[157] For a viewpoint that even the standards of qualified immunity are too easily satisfied by officials, *See* Note, *Accountability for Government Misconduct: Limiting Qualified Immunity and the Good Faith Defense*, 49 Temp. L.Q. 938, 965 (1976).

[158] Economou v. United States Dept. of Agriculture, 535 F.2d 688, 696 (2d Cir. 1976).

[159] Stump v. Sparkman, 435 U.S. 349. 355-56 (1978); Pierson v. Ray, 386 U.S. 547, 553-54 (1967). The principle of absolute judicial immunity, inherited from England, was first recognized in this country on the federal level in Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1872). Courts have frequently stated that the contentiousness of litigation, the greater likelihood of frivolous lawsuits arising out of judicial as opposed to non-judicial proceedings, and the need to preserve the judiciary's independence and decisiveness mandate absolute immunity. *Butz*, 438 U.S. at 512; *Bradley*, 80 U.S. at 348-49.

[160] In Yaselli v. Goff, 275 U.S. 503 (1926), *aff'g mem.*, 12 F.2d 396, 407 (2d Cir. 1926), the principle of absolute immunity for the judiciary was extended to federal prosecutors. This principle was further extended to state prosecutors in Imbler v. Pachtman, 424 U.S. 409, 427 (1976). The rationale behind the quasi-judicial absolute immunity is that the prosecutor's role in the criminal justice system is a sensitive one and that a qualified immunity would adversely affect his freedom of action—both at the indictment level in deciding whether to initiate prosecution and at the trial as an advocate. *Id.* at 425-27.

quasi-judicial officers, such as prosecutors, and of judges supports the need for quasi-judicial absolute immunity.[161] This traditional common law absolute immunity for judges and prosecutors has been held to apply to constitutional claims under section 1983.[162]

In determining whether the policy reasons which underlie absolute immunity for judges and quasi-judicial officers are equally applicable to participants in agency proceedings which are wholly quasi-judicial in nature, the Court of Appeals for the Second Circuit in *Butz* found the judicial analogy inappropriate. The court found that agency officials rely more on documentary proof than on witnesses, and are faced with lesser constraints of time and information than are their counterparts in judicial proceedings.[163] Hence, the Second Circuit felt that a qualified immunity was sufficient.[164]

In contrast, the Supreme Court held that the balance of the competing interests of redress and governmental efficiency calls for absolute immunity for executive officials performing judicial functions in administrative proceedings.[165] The Supreme Court in *Butz* was careful, however, to apply this standard only to the Hearing Examiner, the Judicial Officer, those officials who initiated the actual disciplinary proceeding, and the prosecuting attorney. The Court remanded the case to the court of appeals to determine the status of the remaining defendants.[166]

The Court's holding that these quasi-judicial officials were entitled to absolute immunity rests on solid ground. The Judicial Officer and Hearing Examiner were clearly performing functions analogous to those of a judge. When conducting a hearing, they have equivalent powers, are insulated from political influence, and their decisions are subject to agency and judicial review.[167] Those agency officials who initiated the administrative proceeding are performing a function analogous to that of a prosecutor seeking an indictment. The agency attorney performs a role similar to that of the prosecutor as an advocate at a trial. In light of the settled law on judicial and quasi-judicial absolute immunity, these defendants clearly were entitled to absolute immunity.

Nevertheless, the same cannot be said of the defendants who initiated the investigation and the audit, nor of the Secretary and Assistant Secretary of

---

[161] *Butz*, 438 U.S. at 512 (quoting Imbler v. Pachtman, 424 U.S. 409, 423 n.20 (1976)).

[162] Imbler v. Pachtman, 424 U.S. 409, 427 (1976) (prosecutor); Pierson v. Ray, 386 U.S. 547, 553-55 (1967) (judge).

[163] Economou v. United States Dept. of Agriculture, 535 F.2d 688, 696 & n.8 (2d Cir. 1976).

[164] *Id.* at 696.

[165] 438 U.S. at 512-13.

[166] *Id.* at 517.

[167] The provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551-559 (1976), provide participants in agency proceedings with many of the safeguards which are available in the judicial process. *See, e.g.*, 5 U.S.C. § 555 (b) (right to counsel); *id.* at § 554 (d) (independence of hearing examiner); *id.* at § 556 (c) (power of hearing examiner to issue subpoenas, rule on evidence, regulate course of proceeding, and make or recommend decisions).

Agriculture. These officials did not perform functions analogous to those accorded absolute immunity in a judicial proceeding. Rather, their functions in *Butz* were supervisory and administrative. Absolute immunity for those officials whose conduct was essentially investigatory[168] cannot be grounded on a need to preserve the integrity of the judicial process or its agency equivalents. It must, however, be noted that the difference between the official action in deciding to initiate the investigation of Economou and the official action in deciding to initiate the formal agency prosecution of him is only a matter of degree. It is conceivable that, on remand, the investigatory officials will also be granted this quasi-judicial absolute immunity. If quasi-judicial absolute immunity were to be extended too broadly, however, it could cover virtually all administrative officials. In that case, the exception in *Butz* would swallow up the rule rendering the Court's holding of qualified immunity for constitutional violations mere dicta. While this is a possible development, it is submitted that the Court intended to strictly limit this quasi-judicial absolute immunity to the officials it named or described. It is suggested that the officials who conducted the audit and the investigation should be denied the quasi-judicial absolute immunity granted their co-defendants in *Butz*.[169]

V. Common Law/Constitutional Distinction After *Butz*

The decision in *Butz*, by subjecting federal executive officials to the same qualified immunity standard for violations of an individual's constitutional rights to which their counterparts in state government are held has the beneficial effects of creating uniformity between state and federal immunity and giving consideration to the plaintiff's right to redress. By not overruling *Barr* and by emphasizing that prior absolute immunity rules did not involve constitutional claims, however, the Court in *Butz* seems to be creating a system lacking consistency in the standards of immunity applied to constitutional as opposed to common law claims. This common law/constitutional distinction has a number of problems that are worth examining.[170]

The first problem of the common law/constitutional distinction is an equitable one. The distinction denigrates the right of redress for common law

---

[168] Investigating officials have only a qualified immunity in section 1983 cases. Pierson v. Ray, 386 U.S. 547, 555 (1967).

[169] On remand, the district court drew no distinction between those officials who initiated the investigation and those who commenced the agency prosecution. The group as a whole was held to be absolutely immune on the basis of absolute immunity either for common law torts or for constitutional claims directed against quasi-judicial acts. The court did, however, find two CEA auditors who allegedly falsified their results to Economou's detriment to have only qualified immunity under a cause of action implied from Economou's first amendment claims. See note 52 *supra*.

[170] The distinction drawn by the *Butz* Court between common law and constitutional claims for the purpose of official immunity has been attacked as illogical and undesirable by proponents of both absolute and qualified immunity. *See Butz*, 438 U.S. at 522-23 (Rehnquist, J., concurring and dissenting) (favoring absolute immunity for all officials); Granger v. Marek, 583 F.2d 781, 786-87 (6th Cir. 1978) (Merritt, J., dissenting) (favoring qualified immunity for all officials except judicial and quasi-judicial officers).

wrongs to a level unworthy of the principles of equity which underlie our system of justice. Constitutional claims may appear most deserving of the law's protection, but surely the Framers did not intend to create an inflexible legal code containing all of the individual rights they deemed worthy of protection.[171] Our great regard for the Constitution should not lead to a system where individual rights not enshrined therein are accorded less protection than rights that are so enumerated. The goal of the law should be to redress wrongs done whether the cause of action is grounded in the common law or under the Constitution of the United States.

A second reason why a distinction between common law and constitutional claims is unsupportable is that such a differentiation makes no sense in light of the functional purposes of the doctrines of either qualified or absolute immunity. Qualified immunity attempts to give consideration to the plaintiff's interest in redress by protecting only those officials who act reasonably and in good faith.[172] To give this consideration in only one class of cases is illogical. The right to redress can be just as important in common law as in constitutional cases. It is instructive to note that "the most heinous common-law tort surely cannot be less important to or have less of an impact on, the aggrieved individual than a mere technical violation of a constitutional proscription."[173] Since qualified immunity is a desirable rule for equitable reasons, it should apply in all types of cases.

While qualified immunity is a better general rule than absolute immunity, because it gives some consideration to the plaintiff's right to redress, it should be noted that the common law/constitutional distinction is flawed even if one favors absolute immunity as a general rule. The rationale for absolute immunity is that it is necessary for the efficient administration of the public business; government officials should not have to fear that forthright action, if mistaken, will result in a retaliatory lawsuit.[174] It is unrealistic to believe that officials will conduct their affairs differently depending on whether a malicious or negligent act would give rise to a constitutional or a common law claim.[175] If the public policy of encouraging the efficient and fearless administration of government calls for absolute immunity, it should apply regardless of whether the claim sounds in tort or under the Constitution. Therefore, if the official needs the protection of absolute immunity, the nature of the plaintiff's claim should make no difference. Accordingly, the distinction is untenable in light of the underlying functional rationales of either of the immunity doctrines.

In addition to its equitable and functional shortcomings, the common law/constitutional distinction also has a practical weakness—many common

---

[171] *See* 438 U.S. at 523 (Rehnquist, J., concurring and dissenting). McCulloch v. Maryland, 17 U.S. (4 Wheaton) 316, 407 (1819).

[172] *See Barr*, 360 U.S. at 586-87 (Brennan, J., dissenting).

[173] 438 U.S. at 523 (Rehnquist, J., concurring and dissenting).

[174] *Barr*, 360 U.S. at 571; *Gregoire*, 177 F.2d at 581.

[175] *See* 438 U.S. at 522-23 (Rehnquist, J., concurring and dissenting) (favoring absolute immunity).

law claims can be phrased in constitutional terms.[176] For example, the situation in *Bivens*,[177] involving a warrantless entry by FBI agents, can be characterized as either a common law trespass claim or as a fourth amendment unreasonable search and seizure claim. Similarly, many situations can be characterized as deprivations of due process rather than as common law torts where the alleged wrongdoer is a government official.[178] Indeed, Economou was able to do just that.[179] The easy convertibility of common law claims into constitutional causes of action thus renders unworkable a system where different levels of immunity are accorded defendants depending on the nature of the alleged claim. Indeed, if qualified immunity was recognized in *Butz*, partly to preserve the *Bivens* cause of action,[180] deserving claims should not be defeated merely because the allegations state the wrong legal norm when the right one could have been stated. The plaintiff should not have to be so careful in his pleading. This distinction, if rigorously adhered to, would put an undue emphasis on technical pleading contrary to the spirit of the Federal Rules of Civil Procedure.[181] It thus appears that the common law/constitutional distinction has serious equitable, functional, and practical problems that make adopting it as a crucial part of immunity law an undesirable result. The law should not stress form over substance.

The Sixth Circuit's decision in *Granger v. Marek*,[182] the first decision by a court of appeals on the scope of executive immunity after *Butz*, illustrates the problems inherent in a distinction between constitutional and common law claims. The plaintiff in *Granger*, a professional preparer of tax returns, al-

---

[176] Granger v. Marek, 583 F.2d 781, 786 (6th Cir. 1978) (Merritt, J., dissenting); *Butz*, 438 U.S. at 522-23 (Rehnquist, J., concurring and dissenting).

[177] 403 U.S. at 389. In response to *Bivens*, Congress amended the Federal Tort Claims Act to allow suits against the United States for certain intentional torts committed by federal law enforcement officers. 28 U.S.C. § 2680(h) (1976). While a plaintiff now has a statutory right to redress by the government for conduct violative of both the common law and the fourth amendment, such as trespass, false imprisonment, assault and battery, the cause of action recognized in *Bivens* has been extended to other constitutional claims for which there is now no statutory redress. See note 29 *supra* and the cases cited therein for the extension of *Bivens* to other constitutional claims.

[178] 438 U.S. at 522 (Rehnquist, J., concurring and dissenting).

[179] Economou maintained, for example, that the publication of the complaint and press release—common law defamation—violated his constitutional rights to due process and privacy. *See also* 438 U.S. at 484 n.5; Comment, *Federal Officials—Scope of Immunity from Damage Actions Available to Administrative Agency Officials—Economou v. United States Department of Agriculture*, 30 RUTGERS L. REV. 209, 210 n.8 (1976) (discussing Second Circuit opinion). On remand from the Supreme Court, the district court centered only on Economou's claim that the initiation of the proceeding against him was a retaliatory gesture for his previous outspoken criticism of the agency, thereby depriving him of his first amendment rights. The court found two defendants potentially liable on this ground. See note 52 *supra*.

[180] *See* 438 U.S. at 501.

[181] *See, e.g.*, Mitchell v. White Consol., Inc., 177 F.2d 500, 502 (7th Cir. 1949), *cert. denied*, 339 U.S. 913 (1951); Falcoori v. Cadais, 147 F.2d 667, 669 (5th Cir. 1945), *cert. denied*, 326 U.S. 742 (1945).

[182] Granger v. Marek, 583 F.2d 781 (6th Cir. 1978).

leged that defendant IRS agents engaged in harassing conduct amounting to tortious interference with her business and intentional infliction of mental distress.[183] The agents allegedly told plaintiff's customers that: (1) they would be audited as a result of doing business with her, (2) plaintiff's competitors charged less and should be employed, and (3) plaintiff was under criminal investigation.[184] The plaintiff allegedly was faced with the destruction of her business and the loss of her livelihood. Yet, the majority read *Butz* as calling for a qualified immunity for constitutional claims only, leaving the defendants absolutely immune from liability for their common law torts.[185] The circuit court noted that *Barr* and *Spalding* were not overruled, but distinguished on the basis that those cases did not involve constitutional claims. Accordingly, the *Granger* majority concluded, the rule of absolute immunity still controls common law tort actions.[186]

In contrast, the dissent in *Granger* maintained that *Butz* did not create a rigid distinction between common law and constitutional claims.[187] The dissent maintained that the reasoning of *Butz* implied that the choice between absolute and qualified immunity depended on the role and function of the official, with qualified immunity as a general rule, subject to exceptions for officials performing adjudicatory functions.[188] It implied that *Barr* had been overruled *sub silentio*. The dissent thus saw many of the weaknesses inherent in the constitutional/common law distinction.[189]

The plaintiff in *Granger* could have alleged deprivation of property and her business without due process, and thereby, under *Butz*, have relegated the defendant IRS agents to the protection of only a qualified immunity. Differences in pleading should not determine substantive outcomes in this way. An injury worthy of redress should not be left unremedied because it is a common law as opposed to a constitutional claim. Both types of claims are entitled to equal consideration. Therefore, the constitutional/common law distinction is unsupportable on practical, equitable, or functional grounds. It is submitted that the Supreme Court should overrule *Barr v. Matteo*[190] and apply qualified immunity as the general rule for federal executive officials for common law as well as constitutional claims.

CONCLUSION

Butz v. Economou is a worthy decision which is nevertheless fraught with analytical inconsistencies. Scope of authority has been redefined to include the notion of constitutional and statutory constraints on the officer's authority which, if violated, will potentially limit his protection to that afforded by a

---

[183] *Id.* at 782.
[184] *Id.*
[185] *Id.* at 784.
[186] *Id.*
[187] *Id.* at 786 (Merritt, J., dissenting).
[188] *Id.*
[189] *Id.* at 786-87.
[190] 360 U.S. 564 (1959).

qualified immunity. The decision has implicitly created a distinction between common law and constitutional claims which will be subject to conflicting interpretations. For the moment, however, absolute immunity remains the rule for common law torts and qualified immunity is the rule for constitutional claims. While this distinction has its faults, the *Butz* decision has two salutary ramifications. The first is that the level of immunity for federal and state executive officials who violate individuals' constitutional rights is now the same. Second, although only in the constitutional area, the wronged plaintiff's interest in redress has been placed on par with the societal interest in governmental efficiency.

BLAKE HORNICK